



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 86 OF 2019

CONSOLIDATED WITH CRIMINAL APPEAL NO. 87 OF 2019

BETWEEN

LUQMAN KHATIB MUSHEE.....1ST APPELLANT

HKS.....2ND APPELLANT

MOHAMED AHMED SHARIF.....3RD APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence passed by Hon. E. Kagoni PM on 11.07.2019 in Mombasa CMCR No. 2334 of 2014)

JUDGMENT

Introduction.

1. This Court vide order issued on the 6.11.2019 ordered that Criminal Appeal No. 86 of 2019 and No. 87 of 2019 be consolidated and heard together and a determination made in Appeal No. 86 of 2019 since the two appeals emanate from the same judgement of Hon. E. Kagoni PM in Mombasa CMCR No. 2334 of 2014.

2. The appellants herein were charged with Robbery with Violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The 1st Appellant was charged with a 2nd count of Being in Possession of Narcotic Drugs Contrary to Section 3 (1) as read with section 2(b) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994.

3. The Appellants pleaded not guilty and the case proceeded to full hearing. They were convicted of the main count and the trial court sentenced them to serve life imprisonment, after taking into account their mitigation and treating them as first offenders.

4. The 1st Appellant being aggrieved by that decision lodged an Appeal to this Court against the conviction and sentence vide a Petition of Appeal dated 19.07.2019, on the following grounds;

- 1. That the learned Trial Magistrate erred in law and fact in proceeding with the matter to conviction on a charge that was defective.**
- 2. That the learned Trial Magistrate erred in law and fact in finding that the offence as charged had been proved.**
- 3. That the learned Trial Magistrate erred in law and fact in finding that there was enough evidence to sustain a conviction even after finding that there was no single eye witness.**
- 4. That the learned Trial Magistrate erred in law and fact in failing to consider the inconsistency and the gaps in the prosecution case which would have entitled the accused to the benefit of doubt.**
- 5. That the learned Trial Magistrate erred in law and fact in denying the appellant the benefit of doubt and right assessment of his defence.**

6. That the learned Trial Magistrate erred in law and fact in failing to arrive to a conclusion, supported by evidence.

7. That the sentence was manifestly excessive.

5. The 2nd and 3rd appellants being aggrieved by that decision lodged an appeal to this Court against the conviction and sentence vide Amended Petition of Appeal filed in court on 22.11.2019, on the following grounds;

1. That the learned Magistrate erred both in law and fact in convicting the appellants when there was no sufficient evidence tendered against them thus a miscarriage of justice.

2. That the learned Trial Magistrate erred in law and fact in sentencing the appellants to life imprisonment despite the fact that the appellants were of minority age at the time of commission of the alleged offence.

3. That the learned Trial Magistrate erred in law and fact by failing to order for an age assessment on the appellant despite the prosecution request for the same.

4. That the learned Hon. Magistrate erred in law and in fact in failing to find that the police officer who allegedly recovered the murder weapon (sword) were never called to testify in the trial.

5. That the learned Magistrate erred both in law and fact by failing to observe that no eye witness was called to testify.

6. That the learned Magistrate erred both in law and fact in convicting the appellants while purely relying on circumstantial evidence that was unreliable and which did not conclusively point at the appellants with precision.

7. That the learned Magistrate erred both in law and fact by convicting the appellants despite the existence of screaming contradictions, inconsistencies and lack of corroboration on the respondent's evidence.

8. That the learned Magistrate erred both in law and in fact by shifting the burden of proof to the appellants.

9. That the learned Magistrate erred both in law and in fact by convicting the appellants without considering the corroborated defence put forth by them hence and which was not challenged by the respondent arriving at a wrong conclusion in law.

10. That the learned Magistrate erred both in law and fact by failing to consider the appellants' mitigation and proceeded to hand the appellants a harsh sentence.

11. That the learned Magistrate misapprehended the facts, applied the wrong principles of law and drew erroneous conclusion to the prejudice of the appellant.

Submission

6. When the appeal came up for directions, the Court directed that the appeal be canvassed by way of written submissions. The 1st appellant filed his submissions on 6th October, 2020. Mr. Magolo submitted that the 1st appellant was the 5th accused before the Trial Court. On whether there was a robbery, counsel submitted that there is very little evidence to suggest that there was a robbery since there was no testimony as to what had occurred leading to the deceased death.

7. Mr. Magolo submitted PW3 testified that she was called by a person who said the deceased had been killed. He submitted that the Trial Magistrate held that;

“As I have already found, no eye witness who witnessed the robbery testified. It is therefore known who committed the robbery or how many people were involved and if there was any motor vehicle involved in the said robbery. The six accused persons who were arrested were in a motor vehicle in which PW 4 recovered the assault weapon.”

8. Counsel submitted that even assuming the mobile phone said to have been found on the 5th accused belonged to the deceased, that would have not been enough to prove robbery. On whether the mobile phone recovered was properly identified, **Mr. Magolo** submitted that phones are identified by way of serial or IMEI numbers, PW3 George Madzomba testified that he had given the phone to the deceased and identified it by its color and some mark which was not proper identification.

9. On the prosecution case, counsel submitted that it was based on the arrest of the accused persons and a 'recovery' of a weapon and a phone and that it lacked direct evidence as to what had happened to the deceased. **Mr. Magolo** submitted that the prosecution did not adduce any evidence of robbery as defined.

10. On the search, counsel submitted that for any evidence of search to be without fault, the search ought to be shown to have been orderly and beyond suspicion. That as per the testimony of PW4, the search seems to have been conducted by all the officers at the same time with

no order and no record kept. **Mr. Magolo** further submitted that the fact that the investigating officer and the duty officer referred to by PW4 never testified, the inference is that their testimony may have been unfavorable to the prosecution. To conclude, counsel submitted that the evidence availed by the prosecution was not sufficient to support a conviction and urged this Court to allow the appeal and the 1st appellant to be set at liberty.

11. The 2nd and 3rd submissions were filed on 17th August, 2020. **Mr. Hamza** submitted that Section 295 and Section 296 (2) of the Penal Code represents two different and distinct offences and by charging an accused person, it presents a duplex charge sheet and in most cases the charge ends up being defective. Reliance was placed on the case of **Titus Wambua v Republic** [2016] eKLR.

12. **Mr. Hamza** further submitted that besides PW4, the other three officers who were allegedly in the company of PW4 and witnesses to the alleged recovery of the alleged murder weapon did not testify and no explanation as to why they were not called to corroborate the testimony of PW4 was tendered. He submitted that the prosecution is not required to call a superfluous number of witnesses to prove their case but failure to call critical witnesses is fatal to the prosecution case as was held in **Republic v George Onyango Anyang & Another** [2016] eKLR.

13. **Mr. Hamza** submitted that the passenger who was seated behind the driver was the one who was charged with possession of the bhang and he was acquitted vide Section 210 of the Criminal Procedure Code on ground that he did not have actual possession of the bhang yet to the contrary, the three appellants were convicted on the premise that allegedly a knife contaminated with the blood of the victim was recovered while hidden in the said vehicle while none of them (confirmed) had actual possession and neither was knowledge and control of the knife.

14. **Mr. Hamza** also submitted that CPL Komora who presented the items recovered by PW4 to the Government chemist (PW2) despite having been summoned by Court to shade light on some pertinent issues, had not testified by the close of the prosecution's case. Counsel submitted that the Trial Magistrate violated the guidelines and principles of drawing a judgment as guided by the law vide section 169 of the Criminal Procedure Code by convicting the appellants without identifying the issues for determination on the basis of the evidence on record. Counsel relied on the case of **Stephen Charo Mavuo v Republic** [2015] eKLR.

15. It was further submitted by **Mr. Hamza** that the trial Magistrate erred by holding on one hand that there was no direct evidence against the appellants in relation to the offence but at the same time he failed to state the threshold in determining a case purely based on circumstantial evidence and to weigh the same against the evidence on record for determination on whether the case was proven beyond reasonable doubt. Counsel further submitted that despite the finding that there was no eye witness, there was nowhere in his judgment where the Trial Magistrate stated that the case was purely circumstantial and whether the scale of measuring a case purely based on circumstantial evidence had been met. Counsel cited the case of **Solomon Kirimi M'rukaria v Republic** [2014] eKLR where the Court referred to the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

16. **Mr. Hamza** submitted that the evidence of PW4 lacked the necessary corroboration and substantiation so as to be crown as credible. He contended that PW4 did not present any inventory to confirm the recoveries and neither did he refer to any OB entry and chain of custody log to confirm that he ever made recoveries. He further submitted that the appellants came to learn about the alleged knife and its recovery the following day after their arrest thus placing the onus on the prosecution to prove that it is the appellants who had possession of the said knife. Counsel submitted that the identification of the vehicle was not the crux of the matter but the witnesses identifying the exact location inside the car where the alleged recoveries were made, which was not done.

17. **Mr. Hamza** submitted that the learned Magistrate based his decision on assumptions, speculation and apprehensions thus prejudicing the appellants. Counsel submitted that the Trial Magistrate found that no eye witness witnessed the robbery testified, therefore it is not known who committed the robbery or how many people were involved and if there was any motor vehicle involved in the said robbery as such it was not sufficient to convict on the sole ground that a knife allegedly recovered in the vehicle in question matched the DNA of the victim.

18. Counsel also submitted that the Government chemist testified to the effect that the blood stains on the cut floor carpet and floor mat did not match the blood on the knife thus placing the claims of recovery of the knife and Samsung phone by PW4 to be extremely suspect. He also contended that according to CPL Komora, he did the recovery at 00.30am on the 16/12/2014 however going as per the narrative of PW4 he left Likoni ferry at 1.00am and made the recovery thereafter thus the alleged recovery of the knife in the motor vehicle in question is extremely suspicious and shouldn't have been the ole link to connect the appellants' to the said offence.

19. **Mr. Hamza** submitted that for lack of any direct evidence, the prosecution's case is purely circumstantial and primarily based on suspicion. Reliance was placed on the case of **Republic v Yusuf Nkuru Gitonga** [2011] eKLR and counsel submitted that suspicion no matter how strong can never be the basis of a conviction. He submitted that the learned Magistrate erred in shifting the burden of proof to the appellants after the prosecution failed to avail material and crucial witnesses. That under the presumption of innocence under Article 50 (2) (a) of the Constitution of Kenya, the accused person has no duty to prove his innocence. Counsel further submitted that PW2's evidence that the samples, the exhibits in question, did not match with any of the appellants' DNA profile generated.

20. Counsel submitted that PW4 while at central police station, heard from the control room a report of a stolen motor vehicle registration no. KBV 136 R black in color and that the vehicle had been used in a murder scene in majengo, he went further to state that he wanted to verify whether the motor vehicle belonged to the father of the 2nd appellant. That with this revelation, it was erroneous for the trial Magistrate to

conclude that the motor vehicle in question was owned or hired by the 1st accused person and the 3rd appellant. **Mr. Hamza** submitted that the production of the post-mortem report goes beyond the confirmation of death and the possible cause of death, it is also meant to confirm the identity of the dead body, he further submitted that PEXH8 the post mortem report states that the dead body was under the escort of CPL Komora and the identifying witness is Titus Tunje who had not testified by the close of the prosecution case and reasons of his failure to testify was never told, thus the prosecution failed to identify the victim to be one Samuel Mbura, he placed reliance on the case of **Republic v Alfred Kachola Mage & Another** [2016] eKLR.

21. **Mr. Hamza** submitted that from the disorganization of the prosecution case and evidence, the defence given by the appellants before the Trial Magistrate stands. Counsel submitted that the Trial Magistrate erred in sentencing the appellants to life imprisonment in the absence of any aggravating factors while the circumstances favored (only if the case had been proved to the required standard) a more lenient sentence to the contrary despite relying on the Supreme Court case of **Francis Muruatetu** on matters sentencing.

22. **Mr. Hamza** submitted that the Trial Magistrate should have called for a pre-sentencing probation report so as to be advised on the most appropriate sentence considering the age of the appellants at the time of their arrest. He submitted that the appellants being first time offenders and teenagers it was not deserving to sentence them to life imprisonment in line with Section 191 of the Children's Act which prohibits Courts from sentencing children to a term of imprisonment despite the backdrop that a life was said to have been lost. Reliance was placed on the cases of **Republic v A.W.N** [2010] eKLR and **A.W.M v Republic** [2009] eKLR. Counsel urged this Court to find that the appeal is merited and quash the conviction and set aside the sentence of life imprisonment.

23. The respondent filed its submissions on 7th December, 2020. On the age of the appellants, **Ms. Karanja** submitted that the age of an individual is a matter solely within their knowledge thus it would have been incumbent on the appellants who were represented at trial, to avail their birth documents if indeed they were minors at the time of the offence and the same issue was not raised during mitigation, he also stated that section 109 of the evidence act states that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, therefore it would be to stretch the tenets of fairness to fault the judicial officer for not calling for an age assessment since the Magistrate who wrote the judgment took over proceedings after prosecution witnesses had testified and was thus never privy to any issue over the age of the appellants.

24. On the absence of testimony from eye witnesses and the investigating officer, **Ms. Karanja** submitted that the witnesses feared for their lives and refused to come forward and testify even after recording statements. He also submitted that on the date given for the investigating officer to come to Court, one of the accused was not produced in Court causing an adjournment and immediately thereafter, the trial Court went on transfer occasioning further adjournments and by the time the new Magistrate took over, the prosecution was denied another chance to avail the investigating officer together with the other witnesses hence closing the prosecution case prematurely.

25. **Ms. Karanja** further submitted that the Trial Court found that the prosecution had explained why they failed to avail eye witnesses and urged this Court to reject the appeal by the defence counsel to draw an adverse inference in the circumstances. Counsel also submitted that in any event the rules of evidence hold that no particular number of witnesses are required to prove any fact.

26. On circumstantial evidence and the prosecution case, **Ms. Karanja** further submitted that it is not in doubt that the prosecution's case was circumstantial since a routine police patrol led to an arrest of the appellants on suspicion of a likely offence in progress and in searching the motor vehicle, the arresting officer recovered a knife from under the seat of the motor vehicle. He submitted that the DNA evidence on the blood stained knife was a match for the deceased and the Court found that the appellants were arrested just two hours after the robbery and in possession of a knife stained with the deceased's blood thus sufficient to prove that the appellants were involved in the robbery that claimed the life of the deceased. Reliance was placed on the case of **Douglas Thiongo Kibocha v Republic** [2009] eKLR where the learned judges found that there was enough circumstantial evidence to tie the appellant to the murder of the victim in the absence of a reasonable explanation to the contrary.

27. On the appellants' defence, mitigation and the burden of proof, Counsel submitted that the trial Court went into great length to summarize the evidence given by all the accused persons and also considered that the appellants admitted that they were together on the material night and were arrested in the same vehicle. **Ms. Karanja** further submitted that the trial Court did not ignore the appellants' mitigation and noted that they were first offenders and cited Muruatetu case in order to give a more lenient sentence than the death penalty.

28. On the appellants' submissions and authorities cited, **Ms. Karanja** submitted that there was sufficient description of the deceased's mobile phone since the charge sheet indicates that the phone in question was a mobile phone make Samsung 333 and the owner of the said phone testified in Court as PW3 and was able to describe the gadget in detail, he was also able to explain why he did not avail a purchase receipt and was honest in saying that he did not know the IMEI number and that his description matched that of PW4 the arresting officer. Reliance was placed in the case of **Peter Gathugu Migwi v Republic** [2007] eKLR.

29. On the manner in which the search and recovery was conducted, **Ms. Karanja** submitted that Section 29 (g) of the Criminal Procedure Code gives police officers power to arrest any person whom he finds in a street or a public place during the hours of darkness and whom he suspects upon reasonable grounds of being there for an illegal or disorderly purpose or who is unable to give a satisfactory account of himself. He further submitted that while the arresting officer admitted that he never prepared an inventory of the items recovered, the Trial Court found that the exhibit memo form which was produced in Court unchallenged showed that the blood stained knife was forwarded to the government analyst.

30. On the manner in which the trial Court recorded its judgment, **Ms. Karanja** submitted that Section 169 of the Criminal Procedure Code requires that the judgment ought to contain the points for determination, the decision thereon and the reasons for the decision. She further submitted that the superior Courts have held on a number of cases that the form and format is not a rigid one so long as the judgment contains a determination and the reasons for that determination. On sentencing Counsel submitted that the Trial Court exercised its discretion properly in the circumstances since a life was lost in a very needless manner thus the learned Magistrate was right to find the aggravating circumstances.

31. **Ms. Karanja** relied on the case of **Harward Shikanga & Another v Republic** [2008] eKLR and **Reuben Gitonga Nderitu v Republic** [2009] eKLR in both cases the investigating officers were not called to testify and the Court of Appeal Judges held that it was not fatal since each case has to be determined on its own circumstances so as to determine the effect of such failure. Counsel urged Court to find that the three appellants were properly connected to the robbery and dismiss the appeal in toto.

32. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Okeno v Republic** [1972] EA 32 where the Court of Appeal on the duty of the Court on a first appeal held that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”

33. I have considered grounds of appeal and respective submissions. I have also re-evaluated and re-examined the evidence on records in the trial court as well as the judgment of the trial Magistrate and the issues that arises for determination is whether the prosecution proved beyond all reasonable doubt that the appellants committed the offence of robbery with violence contrary to section 296 to the penal code.

34. Section 296(2) to the penal code reads;

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.

35. From the evidence on record in the trial court there was no eye witness to the robbery with violence that took place on the night of 15th & 16th of December 2014 in Sabasaba area where Samuel Mbura the guard at the Forester Bar was murdered and his mobile phone make Sumsung 333 stolen. However, while PW 4 Corporal Daniel Rotich was on night patrol in company of PC driver Cherioyot and PC Mwarobi they came across the motorvehicle in which the appellants and three others were occupying. The said vehicle was moving slowly and then stopped suddenly on seeing police vehicle. PW 4 said that they blocked the motorvehicle and ordered the occupants to surrender and took the ignition key. That upon conducting search, they recovered several mobile phones including Sumsung 333 which was specifically removed from the 1st appellant's possession. The 1st appellant sat behind the driver and underneath the floor mat where he sat behind the driver was recovered a knife that was in a sheath. While PW 4 and colleagues were escorting the appellants to the police station they learnt from the control room that a motor vehicle registration KBV 136 R had been stolen and used for a robbery in which a security guard was murdered. PW 4 removed the knife from its cover and found that it had fresh blood stains. This raised suspicious that the occupants of the subject motorvehicle may have committed robbery and murder.

36. The phone that was recovered from the 1st appellant was identified by PW 3 as the one he had given to the deceased guard. PW 1 government analyst examined the blood stains on the knife that was recovered on the subject motor vehicle and compared it to the blood samples drawn from the deceased and found the DNA profiles matched. The blood stains on the mat where the knife was recovered was examined and found to be human blood but the same was neither match with the blood drawn from the appellant or the deceased person.

37. Although there was no eye witness to the heinous murder of the guard on the material night PW 4 and his colleagues accidentally bumped into the suspects and forensic investigations established that the murder that had taken place a few hours before the appellants were arrested was committed using a weapon that was recovered in the vehicle occupied by the appellants and their companions. There was no dispute that the appellants were in the subject motor vehicle and although there was no inventory as to the recovery of the knife and the phone by PW 4 it did not occur that PW 4 would have a reason to implicate the appellants with the murder of the night guard.

38. The appellants claim that they were from Nyalia and were going to meet a client who had hired them to do catering service at their wedding but this defence only arose after the prosecution case was closed. The name of the said client and the place where the catering was supposed to take place was not disclosed and even if the prosecution had wished to investigate the claims of the appellants after they had testified there was no specific particulars to lead to the said client. From the record it comes out that the appellants held from Majengo area where this offence was committed and not Nyalia where they alleged to have come from on the material night.

39. In conclusion, the evidence adduced by the PW 4 as to recovery of the phone and blood stained knife as well as the blood stained floor mat in the car and the evidence of the PW 3 as the identity of the phone recovered from 1st appellant coupled with the evidence of the government analyst PW 1 that the blood stained on the knife matched the DNA profile of the blood sample taken from the deceased linked the appellants and their co-accused who were in the motor vehicle to the robbery and the night guard at the Saba Saba area. This court therefore finds that there is no reason to warrant the unsettling of the finding by the trial Magistrate that the appellants were guilty of the offence of robbery with violence. The appeal is therefore dismissed. On the issue of the 2nd appellants age it is shown on the record of the trial court that on 24th December 2014, the 2nd appellant was aged 17 years old at the time he committed the offence and therefore ought not to have been sentenced to imprisonment rather he ought to have been treated as a child under the Children Act by being committed to Borstal institution or being detained at the president's pleasure in consideration that he has been in custody since 1st of July 2019 I find that he has been punished enough and should therefore be released forthwith unless otherwise lawfully detained.

40. For the 1st & 3rd appellants their conviction is confirmed save that sentence to life imprisonment is substituted with the definite sentence of 20 years imprisonment.

It is so ordered.

Right of appeal in 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MAY, 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE